Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

No. 95-740

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNION SECURITY LIFE INSURANCE CO.,
Petitioner,

v.

EVELYN CROCKER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF *AMICUS CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

QUESTION PRESENTED

Whether the $2 million punitive exaction in this case, which is at least 137 times the economic harm suffered by respondent, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

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BRIEF *AMICUS CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

INTERESTS OF THE *AMICUS*[1]

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of more than 600 member life insurance companies; these companies currently underwrite 91 percent of the life insurance in force in legal reserve life insurance companies in the United States.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the *amicus*' members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers and have deferred to those awards even though they are imposed without meaningful standards and bear no rational relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance.

One such decision, in which ACLI has also filed an *amicus* brief, is currently being reviewed by this Court in *BMW v. Gore*, No. 94-896 (*"Gore"*). Due to its genuine interest in the constitutionality of current punitive damages law, the *amicus* has also filed briefs in this Court in prior cases involving this issue. *See, e.g., Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*,

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[1] Counsel for both the Petitioner and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief presents to the Court the view of the *amicus*, based on the experience of its broad-based constituents, concerning the importance of the Court's intervention in this case—a case that, perhaps better than any other case previously before this Court, squarely presents the constitutional problems with excessive punitive damages awards.

STATEMENT

1. Petitioner Union Security Life Insurance Company ("Union Security") sells, among other products, credit life insurance. This insurance pays off the balance of a loan where the insured debtor dies during the term of the loan. Pet. 2. During the period relevant to this case, First Alabama Bank ("First Alabama") and its branch at Choctaw ("First Alabama, Choctaw") were authorized to sell group credit life policies on behalf of Union Security. Pet. 2.

Union Security required that all individuals seeking credit life insurance for amounts over $10,000 fill out a "Statement of Debtor's Physical Condition" (hereinafter "Health Statement"). Pet. 2. The form, as it existed at the relevant time, asked whether the debtor had experienced a variety of health conditions over the preceding five years. Pet. 2. Among the listed conditions were "heart disease" and "nervous disorder." Pet. 2-3. It was and is Union Security's uniform policy to deny insurance to any applicants who acknowledge that they had experienced one of the listed conditions. Pet. 3.

If the insured debtor dies within the contestability period of one year that is permitted under Alabama law,[2]

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[2] The contestability period is the period of time during which the insurance company may dispute coverage on the basis that the policyholder made a material misstatement in his/her policy application. Alabama insurance regulations set this period at one year for credit life insurance policies. *See* Ala. Ins. Reg. No. 28, § VI(J)(2).

and dies from a condition apparently covered by the Health Statement, Union Security's uniform policy is to investigate whether the policyholder's Health Statement contained material inaccuracies. Pet. 3-4. If Union Security learns that the cause of death actually was an undisclosed pre-existing Health Statement condition, it denies the claim and returns the premium to the policyholder's representative. Pet. 4. Otherwise, it pays the claim without further inquiry. Pet. 4-5. Union Security only rarely denies a group credit life claim on the basis of such nondisclosure; these denials have occurred for under one percent of all of Union Security's group credit life claims. Pet. 4.

2. Respondent Evelyn Crocker, together with her husband, Coleman Crocker, purchased a group credit life insurance policy in conjunction with a loan from First Alabama, Choctaw in October 1990. Pet. 5. For years prior to buying the policy, Mr. Crocker had suffered from heart disease and Parkinson's Disease. Pet. 4-5.

Samuel Taylor, an employee of First Alabama, Choctaw, sold the Crockers the group life policy. Taylor filled out the Health Statement for each of the Crockers, indicating on the statement that neither had any of the listed medical conditions. Pet. 6. After having an opportunity to review his Health Statement, Mr. Crocker signed it, even though it inaccurately reflected that he had not suffered from heart disease or a nervous disorder. *Id.*

Mr. Crocker died of heart disease approximately nine months after the closing on his loan and the signing of his Health Statement. Pet. 8. Mrs. Crocker then made a claim for the loan balance. Because Mr. Crocker had died within the one-year contestability period and because the cause of death was a medical condition listed in the Health Statement, Union Security acted in accordance with its policy and investigated Mrs. Crocker's claim. *Id.* After learning from Mr. Crocker's doctor that Mr. Crocker was suffering from heart disease at the time he signed the Health Statement, Union Security denied Mrs. Crocker's claim and refunded Mr. Crocker's premium. *Id.*

3. Following Mr. Crocker's death, Mrs. Crocker stopped making payments on the loan and filed suit in Choctaw County court against Union Security, First Alabama, and First Alabama, Choctaw. Pet. 8. Mrs. Crocker's amended complaint alleged, *inter alia*, that Taylor, as an agent of both First Alabama and Union Security, had fraudulently "concealed" from the Crockers that he had disclosed inaccurate information on the Health Statement, that they had to be in good health to get the credit life policy, and that, if Mr. Crocker were to die of heart problems or a nervous disorder, coverage would be denied. Pet. 9. Only these fraud claims went to trial, as the trial court dismissed the breach of contract and bad faith claims against Union Security. Pet. App. 1a.

At trial, no evidence was presented that Union Security had authorized Taylor or any other agent to fill out Health Statements inaccurately or to conceal the fact that inaccuracies on a Health Statement could result in the denial of a claim. Pet. 6, note 7. Instead, Mrs. Crocker's attorneys laced their questioning and argument with evidence of Union Security's out-of-state location, foreign ownership, substantial aggregate premiums, and other irrelevant facts. Pet. 9-10. After deliberating for little more than a half-hour, the jury returned a general verdict holding the defendants jointly and severally liable for $5 million on the fraud theory. Pet. App. 1a-2a.

The trial court, after conducting a post-trial evidentiary hearing under *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), sustained the jury's finding of fraud, but granted a *remittitur* of $2 million in punitive damages. The trial court concluded that the $3 million punitive damage award against Union Security was not excessive, even though the trial court acknowledged that Union Security's liability was entirely vicarious and, even then, was an "isolated incident" rather than part of a pattern of conduct. Pet. App. 20a, 23a. The trial court further concluded that $3 million was not excessive because Union Security had realized a net gain of $1.29 million from the sale of credit life insurance nationwide

and because Mrs. Crocker suffered "grievous" harm from the failure of the Crockers' bargained-for "expectations" under the policy. Pet. App. 20a.

Both defendants filed notices of appeal. First Alabama, Choctaw entered into a *pro tanto* settlement with Mrs. Crocker that released First Alabama for $1 million. After learning of the settlement, Union Security successfully moved for a remand to the trial court for purposes of determining whether the $2 million that remained of the judgment was excessive in relation to Union Security's conduct. Pet. 12. Refusing to conduct a new hearing, the trial court issued a short order effectively holding that $2 million was not excessive as to Union Security. Pet. App. 28a-31a.

The Alabama Supreme Court affirmed the trial court's decision in all respects. The Alabama Supreme Court agreed that a $2 million punishment for Union Security was not excessive as it was an "amount necessary . . . in order to exorcise fraud and inequity from the marketing of credit life insurance policies." Pet. App. 11a-12a. In this regard, the Alabama Supreme Court held Union Security's marketing practices inequitable and deserving of punitive damages on the sole basis of language in a freshly-minted, unreported 1995 opinion. *Huff v. United Ins. Co. of America*, 1995 WL 317676 (Ala., May 26, 1995), decided more than three-and-a-half years after the Crockers' policy was issued. Pet. 13-14.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE SAME IMPORTANT CONSTITUTIONAL QUESTIONS CONCERNING THE EXCESSIVENESS OF PUNITIVE DAMAGES THAT WERE PRESENTED IN *GORE* AND SHOULD, AT A MINIMUM, BE HELD FOR DISPOSITION IN LIGHT OF *GORE*.

In many respects, the issues in *Crocker* are mirror images of those in *Gore*, where this Court is reviewing whether a $2 million punitive damages award is so excessive as to violate due process under the Fourteenth

Amendment. Like *Gore*, this case raises the same broad and recurring question: what is the "constitutional calculus" for deciding whether an award of punitive damages is grossly excessive and without a reasonable relationship to punishment and deterrence? *See, e.g., Haslip*, 499 U.S. at 22 (1991) (to satisfy the requirements of the Due Process Clause, punitive damages standards must "provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter"). And, like *Gore*, this case presents a number of related issues that warrant this Court's resolution, either in *Gore* or here, including the recurrent problems of using punitive damages awards to punish for lawful extraterritorial conduct, punish for conduct contemporaneously lawful within Alabama, and punish on the basis of a corporate practice undertaken for legitimate business reasons.

The significance of these constitutional questions prompted the Court to grant certiorari in *Gore*. Because the determination of constitutional excessiveness here depends on the Court's holding in *Gore*, this case should, at a minimum, be held for disposition in light of the resolution of *Gore*. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* §§ 4.16, 5.9 (7th ed. 1993).

II. IN THE EVENT THAT THESE RECURRING AND IMPORTANT CONSTITUTIONAL ISSUES EVADE DEFINITIVE RESOLUTION IN *GORE*, THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THE COURT TO ADDRESS THE EXCESSIVENESS ISSUE.

A. The Current Confusion Regarding Due Process Limitations On Punitive Damages Awards Will Continue Absent This Court's Definitive Resolution Of The Excessiveness Issue In *Gore* Or In This Case.

If the Court does not decide to address the full scope of the excessiveness issue in *Gore*, it should do so in *Crocker*. Both cases amply dramatize that punitive damages have indeed exceeded any legitimate bounds and

"run wild." *Haslip*, 499 U.S. at 18. *Gore* involves a judicially-sanctioned $2 million punishment for failing to disclose that a physician's BMW had undergone a paint job that affected its value, by at most, $4,000. This case, perhaps more egregious than *Gore*, involves a judicially-sanctioned $3 million punishment for an insurer's failure to pay a $14,563 claim under an insurance policy that was procured through the applicants' fraud.

To be sure, this Court has already declared that "general concerns of reasonableness . . . properly enter into the constitutional calculus" in determining whether an award is unconstitutionally excessive. *Haslip*, 499 U.S. at 18. Yet, the Court has not specifically identified what criteria or factors are indicators of unreasonable excessiveness.

Unless the Court elucidates the criteria for measuring punitive awards for unconstitutional excessiveness, lower courts will continue to address punitive damages awards without meaningful, objectively-measurable criteria for deciding whether a particularly large punitive damages award is unconstitutionally excessive, *i.e.* not reasonably related to punishment and deterrence. The current lottery-like system of large punitive awards will continue unrestrained —with no real assurance to defendants that their constitutional rights to due process will be protected—unless this Court intervenes with meaningful criteria for judicial review of the constitutionality of punitive awards. *See, e.g., Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 310 (Ky. 1993) (affirming $5.75 million award while stating that *Haslip* "did not identify the parameters [state courts] should apply in insuring that an award of punitive damages meets the test of due process").

B. The Alabama Courts' Justifications For Upholding The $2 Million Punitive Award Against Union Security Clearly Fail To Establish A Reasonable Relationship Between The Punitive Exaction And The Goals Of Punitive Damages.

This Court has repeatedly stated, in its due process jurisprudence, that punitive damages awards greater than

reasonably necessary to punish and deter are unconstitutional. *See Haslip*, 499 U.S. at 21-22 (allowing awards greater than necessary to punish and deter is unconstitutional). Punitive damages awards that are greater than reasonably necessary to punish and deter are those that bear no reasonable relationship to punishing or deterring the conduct at issue. *Id.* These awards fail to serve punishment or deterrence, the ultimate goals of all punitive awards, either by inflicting disproportionate punishment on an offender or by overdeterring or underdeterring future offenders.

The Alabama Supreme Court's and trial court's primary justifications for the size of Union Security's $2 million share of the punitive award were (i) the "inequity" of Union Security's post-claim investigation policy, (ii) its nationwide profits from the sale of credit life policies, and (iii) its supposed denial of bargained-for "expectations" never pled or proven at trial.[3] None of these justifications is rationally related to the goals of punishment and deterrence, and they demonstrate vividly that Union Security's $2 million share of the $3 million award is constitutionally excessive.[4] Indeed, the award is at least 68 times the actual and potential harm to the respondent, at least 2,400 times Union Security's profit, and at least 57 times the

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[3] Under Alabama law, the trial court was required to judge the reasonableness of the jury's award by seven factors under *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala. 1989). Several *Green Oil* factors were not relied on heavily by the trial court or the Alabama Supreme Court to justify the $3 million size of the post-*remittitur* award. These were (i) the degree of reprehensibility of the defendant's conduct, (ii) the costs of litigation (the trial court only mentioned that the attorneys should recover a "significant" amount beyond their $35,000 fee, *see* Pet. App. 22a), (iii) the imposition of criminal sanctions, and (iv) the imposition of other punitive damages awards. Pet. App. 19a-24a.

The trial court rested on its original analysis when it declined to hold Union Security's $2 million share of the award excessive. Pet. App. 31a.

[4] Hereinafter, the brief refers to Union Security's $2 million share of the punitive award as the "award."

respondent's litigation costs. These amounts clearly exceed the four-to-one ratio that this Court, in *Haslip*, deemed "close to the line" of constitutional excessiveness. *Haslip*, 499 U.S. at 23.

1. *The Alabama Supreme Court's Award Of Punitive Damages Against Union Security On The Basis Of Its Lawful Conduct Serves Neither Punishment Nor Deterrence.*

The Alabama Supreme Court justified the amount of punitive damages against Union Security because it was "necessary . . . in order to exorcise fraud and inequity from the marketing of credit life policies." Pet. App. 11a-12a. Specifically, in affirming the trial court's judgment, the Alabama Supreme Court found punishable Union Security's limited use of post-claim, rather than pre-claim, health investigations—a practice that was entirely lawful under Alabama law at the time Union Security applied it to respondent's claim. *Id.* Indeed, as the Alabama Supreme Court's opinion makes clear, the supposed "inequity" of this conduct was first elucidated in Alabama in the 1995 *Huff* case.[5] *Id.*

Essentially, the Alabama Supreme Court punished Union Security for its 1991 conduct on the basis of a 1995 decision in another case against another defendant more than three-and-a-half years later. As the *Huff* court acknowledged, post-claim health investigations were entirely permissible and unobjectionable before *Huff* was handed down in May 1995:

> *As the law in Alabama currently stands*, an insurance company may issue a life insurance policy with

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[5] Other striking evidence exists that the Alabama Supreme Court went to any length to characterize Union Security's conduct as wrongful. The cause of action that would normally encompass intentionally wrongful investigatory conduct by Union Security, the bad faith claim, had already been dismissed by the trial court. Pet. App. 1a. Despite this, the Alabama Supreme Court declared Union Security's investigation policy inequitable.

> its knowledge of its applicant's health coming solely from its agent's questioning of the applicant about his or her health history.

Huff, 1995 WL 317676, at *2 (emphasis added). In fact, because the *Huff* court declined to make such conduct evidence of fraud, and Alabama regulations still explicitly permit credit life contestability within one year, these investigations remain lawful in Alabama. *See Huff*, 1995 WL 317676, at *3 (summary judgment for insurer affirmed); Ala. Ins. Reg. No. 28, § VI(J)(2).

Assessing punitive damages against a defendant for conduct that is lawful when that conduct occurs clearly serves neither the goal of punishment nor the goal of deterrence. This Court has recognized that punishment is fundamentally unfair when it is based on lawful conduct. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. . . .") (citation omitted); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (judicial construction that retroactively enlarges statute, making conduct illegal that was clearly outside prohibition of statute, violates due process). Simply put, no culpability deserving of punishment can exist where a party has no wrongful intent, reasonably believing that its conduct is lawful because the conduct is, at the time, lawful.

Punishing for lawful conduct likewise fails to serve the goal of deterrence. To be effective, deterrence requires that the potential wrongdoer be able to recognize what type of conduct is prohibited. D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1283 (1976). That party then is able to avoid engaging in the type of conduct that is prohibited, *i.e.*, it can successfully be deterred from the prohibited conduct. *Id.* But, where certain conduct is legal when undertaken, no one can possibly recognize the conduct as prohibited, avoid the conduct, and thus be deterred from it. Punish-

ing Union Security for abiding by its contemporaneously lawful post-claim investigation policy sends no meaningful message of deterrence to any potential defendant; it simply sends the message that Alabama courts may sustain large punitive damages awards by arbitrarily and retroactively labelling lawful conduct as "inequitable."

Such retroactive, aggregate punishment on the basis of ordinary business practices is a recurring problem, in Alabama and elsewhere, and should be addressed. *See, e.g., BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (*per curiam*) ($2 million punitive award for uniform repair non-disclosure policy), *cert. granted*, 115 S. Ct. 932 (1995); *Intercontinental Life Ins. Co. v. Lindblom*, 571 So.2d 1092 (Ala. 1990) (close to $1 million punitive award for practice of allowing premium grace period), *vacated*, 499 U.S. 956 (1991), *op. reinstated*, 598 So.2d 886, *cert. denied*, 113 S. Ct. 200 (1992); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1077, 1083 & n.9 (Ariz.) ($3.5 million punitive award based on standard policy of subtracting a cleaning fee of $35 from the estimated value of total loss vehicles), *cert. denied*, 484 U.S. 874 (1987). This case presents a compelling opportunity for this Court to do so.

2. *The Alabama Supreme Court's And Trial Court's Award Of Punitive Damages Against Union Security On The Basis Of Its Nationwide Profit On All Sales Of Credit Life Insurance Serves Neither Punishment Nor Deterrence.*

a. *The Extraterritoriality Problem.* The courts below held that the punitive damages award in this case was appropriate, in part, because Union Security realized a $1.29 million nationwide profit from the sale of credit life insurance. Pet. App. 11a-12a, 21a. The trial court stated, and the Alabama Supreme Court affirmed, that it was appropriate, under the *Green Oil* factors, to remove this profit. *Id.* They did so even though respondent had adduced no evidence that either the sale of credit life in-

surance or post-claim investigations were illegal or considered wrongful in Alabama, much less the forty-nine states besides Alabama.[6] In fact, like Alabama, a vast majority of states consider legal both the sale of credit life insurance and the contestability of credit life claims, though some states, like Alabama, limit the time during which an insurer may contest a credit life claim. *See, e.g.*, Mo. Rev. Stat. § 385.070(d) (1994) (Missouri allows contestability of credit life for two years); Nev. Rev. Stat. Ann. § 690A.230(3) (1993) (Nevada allows contestability of credit life); N.C. Gen. Stat. § 58-57-25(c)(2) (1995) (North Carolina allows contestability of credit life for two years).

Awarding punitive damages based on conduct lawful outside the punishing jurisdiction obviously fails to serve the punishment goal. Alabama clearly has no rational interest in punishing defendants in other states who carry out their conduct in compliance with those states' laws. In punishing Union Security on the basis of its profits earned in forty-nine other states, Alabama seriously infringes upon these states' sovereignty. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-822 (1985) (due process violated where one state applies its law to a series of transactions, the vast majority of which have no connection with the state). It also defies fundamental principles of fairness under the Due Process Clause.

Nor can Alabama possibly have a rational interest in deterring the sale of credit life insurance or the contest-

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[6] In addition, the trial court confusingly considered the overall sale of credit life insurance to be the appropriate "wrongful conduct" for gauging the defendant's profit, Pet. App. 21a, while the Alabama Supreme Court later found the investigation and denial of credit life claims to be this "wrongful conduct." Pet. App. 11a-12a. However, whether the practice of selling credit life insurance or the practice of post-claim investigation was considered "wrongful conduct," punishing for such conduct outside of Alabama serves neither the goal of punishment nor the goal of deterrence.

ability of credit life claims within other states. If the states properly with authority to regulate a practice consider it lawful, they have necessarily determined that the practice should *not* be deterred, and another state can have no rational interest in deterring that lawful out-of-state conduct. Awarding punitive damages based on conduct that other states deem lawful plainly overserves any rational deterrent purpose and is excessive.

b. *The Aggregation Problem.* This case reveals a chilling thread that runs through the Alabama courts' punitive damages decisions. Alabama courts are willing to permit calculation of punitive damage awards simply by aggregating "profit" gained under a common, nationwide corporate practice or policy—without regard to the lawfulness or intent behind that practice or policy. *See, e.g., Gore*; *Lindblom, supra.* Allowing large punitive damages awards to stand because the corporate defendant happened to have a lawful, standardized procedure or practice has no rational connection with the goals of punishment and deterrence.

First, this case is even more extreme than *Gore* in demonstrating that basing punitive damages on "profit" from lawful, business-justified nationwide practices, as calculated by the Alabama courts under *Green Oil,* has no rational relationship to punishment. Here, not only was the $2 million punitive award approved largely on the basis that Union Security had a common corporate practice of selling credit life insurance, or of post-claim investigation, (*see* note 6, *supra*), *but the Alabama courts punished Union Security on this basis despite the trial court's finding that the alleged wrongful conduct (Taylor's purported misrepresentation) was "an isolated incident" not attributable to any overall policy or practice of Union Security.* Pet. App. 20a, 23a. Regardless of this factual finding, both the trial court and Alabama Supreme Court measured damages on the basis of "profit" from a corporate practice or practices that the trial court had acknowledged were

largely, if not wholly, irrelevant to the allegedly wrongful conduct at issue.

The mere fact that a defendant has a standardized practice, of course, does not make it more culpable and deserving of punishment. This is especially true where, as here, the standardized practices—Union Security's nationwide sale of credit life insurance and/or its uniform policy of post-claim investigation—were, at most, tangentially related to the issue in the trial court: the alleged unauthorized acts of a single agent. Standardized corporate policies may, as in this case, simply be required by economies of scale necessary for the company to make any profit at all. *See* Pet. 16 n.14, 18 (where Union Security's profit margin may be as low as 6%, it would be uneconomical to pre-investigate every Health Statement). There was no demonstration of culpable intent in Union Security's adopting such a policy.

Second, calculating punitive damages on an overall "profit" basis bears no rational relationship to deterrence. The Alabama courts, in upholding this award, ignore that the inevitable effect of awarding punitive damages far in excess of the defendant's entire nationwide profit from a business enterprise is to force any rational defendant to stop engaging in that enterprise. Because Union Security profits only $1.29 million from the sale of credit life, the $2 million punitive damages award arising out of a single credit life transaction—one of thousands of credit life transactions each month—wipes out its entire nationwide profit. Instead of deterring insurance companies from engaging in a certain type of conduct—such as giving non-employee agents discretion to sell policies or failing to provide conspicious written notice that false insurance applications could result in denial of claims—such punitive awards will overdeter by giving insurance companies the incentive to leave the credit life business completely. Even Alabama has recognized credit insurance as a worthwhile pursuit, *see, e.g.*, Ala. Ins. Reg. No. 28

(allowing credit life insurance under scheme of regulation), and destroying that business obviously serves no rational deterrence goal. *See, e.g., In re Northern Dist. of Calif. "Dalkon Shield" IUD Prod. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (purpose of punitive damages is to sting, not kill, defendant), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

3. *The Alabama Supreme Court's And Trial Court's Award Of Punitive Damages Against Union Security On The Basis Of Respondent's Unspecified, Unsupported Failed "Expectations" Serves Neither Punishment Nor Deterrence.*

The trial court found, and the Alabama Supreme Court affirmed, that the $2 million punitive award was justified because the respondent's bargained-for "expectations" had "totally failed." Pet. App. 11a-12a, 20a. The trial court never explained why it considered relevant Mrs. Crocker's bargained-for "expectations" after it had dismissed the breach of contract claim against Union Security. Pet. App. 1a. Nor did the trial court explain how these expectations could be any greater in amount than the value of the insured loan, even as it awarded punitive damages greater than 137 times the loan balance. Pet. App. 20a. In sum, the failed "expectations" were a chimera in the trial court's *Green Oil* analysis, used to create a reasonable relationship between the respondent's harm and the size of the punitive award, when, in fact, there was none at all.

Assessing punitive damages on the basis of an entirely subjective, unproven phenomenon, like the supposed failed "expectations" in this case, clearly fails to serve the goals of punishment and deterrence. The basis of punishment cannot be insusceptible of calculation and a potentially unlimited bootstrap for liability, as it was in this instance, and rationally serve the goal of punishment. Of course, where punishment depends on standards that a

defendant cannot possibly know and that may be used to bootstrap any amount of punitive damages to a compensatory award, it overdeters. *See, e.g.*, D. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 729-730 (1989) (unpredictable punitive liability diminishes social utility by deterring useful social conduct); D. Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 988 (1989) ("[U]ncertainty as to potential liability induces overinvestment in liability avoidance, or worse, suppresses innovation, and results in higher insurance costs for all that are insured") (footnotes omitted).

C. Measurable, Objective Standards Exist For Determining Whether A Punitive Award Reasonably Relates To The Goals Of Punishment And Deterrence.

This case, like *Gore*, amply reveals the serious problems that exist for courts attempting to ensure due process in the exaction of large punitive damages awards. Unfortunately, because the *Haslip* opinion offered little guidance as to criteria for measuring unconstitutional excessiveness, cases like *Crocker* and *Gore* are not freakish but common.[7] This Court should intervene and articulate non-exclusive, but objective and measurable, criteria for lower courts to consider in determining whether particular punitive awards are so excessive as to violate the Due Process Clause. Such criteria should include (i) proportionality to the quantifiable harm that the individual plaintiff actually suffered or potentially may have suffered, (ii) comparison with legislative penalties for similar misconduct, (iii) the extent to which the defendant profited from the misconduct toward the particular plaintiff, and (iv) in

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[7] Although the Court approved Alabama's system of post-verdict review in *Haslip*, these cases amply demonstrate that Alabama's system of review is being misapplied in disregard of defendants' due process rights. Thus, an elucidation of criteria by this Court is necessary to keep such appellate review from becoming a hollow, meaningless process.

some cases, the reasonable litigation costs of the plaintiff. These criteria faithfully serve the goals of punishment and deterrence and thus may adequately guide a due process analysis of punitive awards.

Even a cursory examination of these criteria, applied to the facts in this case, reveals that the $2 million punitive damages award against Union Security is constitutionally excessive and warrants this Court's intervention:

1. *Actual and Potential Harm.* The best basis for determining unconstitutional excessiveness is comparing the punitive award to the sum of the quantifiable actual harm suffered by the plaintiff, and the quantifiable potential harm likely to occur to the plaintiff, from the defendant's conduct.[8] *See TXO Prod. Corp.*, 113 S. Ct. at 2721-22 (1993) (plurality opinion) (appropriate to consider actual and potential harm to plaintiff in reviewing punitive damages award). Even taking a liberal view of the damages the respondent suffered, or may have potentially suffered,[9] the $2 million award is clearly excessive.

At the outer limits, the respondent's actual harm could not have exceeded the amount of the balance of the loan ($14,563) that Union Security declined to pay. Even considering that the respondent had the "potential" harm of having her collateral—her residence—foreclosed upon by First Alabama, her total actual and potential harm would unlikely be more than double the loan amount or

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[8] Potential quantifiable harm is also a good measure of the reprehensibility of the defendant's act—a common law standard for punitive damages—that avoids the danger of arbitrariness in applying a vague concept like "reprehensibility."

[9] In taking this view, ACLI does not suggest the petitioner's well-reasoned arguments that the plaintiff suffered a much lower amount of actual damages, Pet. 17-18, are not ultimately correct. The *amicus* brief demonstrates that, even assuming *arguendo* an extremely liberal standard of actual and potential harm, the punitive damages remain unconstitutionally disproportionate.

$29,126.[10] This places the respondent's $2 million punitive damages award against Union Security at a level over *68 times* greater than her quantified actual and potential harm. As ACLI argued in its *amicus* brief in *Gore*, a punitive award that is disproportionate to actual and potential harm should be presumptively unconstitutional, unless the application of the remaining criteria rebuts that presumption—a presumption that the *amicus* contends applies here as well.

Even absent such a multi-criterion approach, this Court's precedent clearly supports the conclusion that the $2 million award here is excessive. Under the similar facts of *Pacific Mut. Ins. Co. v. Haslip*, which concerned an insurer's vicarious punitive liability for its non-employee agent's wrongful conduct in disregard of the insurer's policies, this Court ruled that a ratio of four-to-one between punitive and actual damages was "close to the line." *Haslip*, 499 U.S. at 23. ACLI submits that this case, with a ratio of over 68-to-one even after making favorable allowances for potential harm, has crossed that constitutional line.

2. *Comparative Penalties.* Courts should also compare the punitive award to the legislative and regulatory penalties for the conduct at issue. Here, the Alabama legislature and regulatory bodies have chosen to permit insurers to contest claims made within one year of the policy's signing. *See* Ala. Ins. Reg. No. 28, § VI(J)(2). Where the appropriate governmental bodies in Alabama have chosen not to punish conduct, implicitly setting the penalty for such conduct at zero, it cannot be more consti-

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[10] Had respondent been required to vacate her mobile home, her moving costs and rental costs for an equivalent residence during the trial would not likely have exceeded the amount of the loan balance. Moreover, given the alacrity with which her lawyers responded to service her debt, Pet. 18 n.15, foreclosure was a remote possibility at best.

tutionally disproportionate to levy a multi-million dollar punitive award on the basis of that conduct.[11]

3. *Profits from Misconduct.* In awarding punitive damages, courts should examine the extent to which a defendant profited from its conduct toward that individual plaintiff and remove any profit that was derived from the defendant's *wrongful* conduct pertaining to that individual plaintiff. As discussed above, *see supra*, at 11-15, when calculating this profit, courts should not indiscriminately aggregate all of the defendant's dealings under a general practice—particularly where the practice is not considered "wrongful" in most states. Among other things, this approach punishes a defendant solely for maintaining a standardized practice regardless of whether the practice was wrongful.[12] According to the evidence below, the profit attributable to Union Security for this transaction, a certain portion of the Crockers' premium, existed in an amount somewhere between $66.38 and $830.[13] Since the $2 million award is over *2,400 times*

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[11] While in previous briefs the *amicus* has suggested, as a constitutional criterion, the comparison of a punitive award to other punitive awards for similar conduct, *see, e.g.*, ACLI *amicus* brief at 21-23, *Gore*, the continued proliferation of punitive damages awards unfettered by constitutionally sufficient review increasingly makes this criterion unreliable in measuring punitive awards for unconstitutional excessiveness.

[12] Moreover, because the conduct that appears to be the true basis of the Alabama Supreme Court's opinion is the investigation and denial of the respondent's claim, it is even more improper to consider the net gain of all Union Security's nationwide *sales* of credit life as Union Security's "profit." If "profit" is to be assessed from this conduct, only profit from policies that were denied should be considered. On this basis, punitive damages here exceed 155 times the nationwide profit, and 3,000 times the Alabama profit, that resulted from selling the one percent of Union Security policies that involved denied claims. Pet. 19-20.

[13] These figures are the low-end estimate (4% of Mr. Crocker's premium) and the high-end estimate (50% of the joint premium) of the profit Union Security gained from the Crockers' purchase of credit life insurance. *See* Pet. 17-18.

this amount, the profit-based criterion supports a finding of constitutional excessiveness.

4. *Reasonable Litigation Costs.* Comparison of the punitive award to the reasonable litigation costs of the plaintiff likewise does nothing to justify the excessive amount of the award in this case. In some cases, it may well be appropriate to measure punitive damages in terms of reducing the cost of otherwise uneconomical litigation to encourage plaintiffs to bring merit-worthy claims, especially where the detection of the wrongful conduct is unlikely. But, even considering the $35,000 that the respondent's attorneys allegedly spent in litigation, the $2 million punitive damages award is over *57 times* that amount.

CONCLUSION

In sum, the punitive damages award against Union Security grossly exceeds any amount that could be reasonably deemed to serve the goals of punishment and deterrence. Taking into account all the relevant factors—that the award is greater than *68 times* the actual and potential harm to the respondent, that the petitioner's conduct was *explicitly permitted, not penalized*, by Alabama before this case, that the award is greater than *2,400 times* the petitioner's profit, and that the award is greater than *57 times* the respondent's legal costs—the award is unconstitutionally excessive.

The petition for a writ of certiorari should either be held pending the disposition of the *Gore* case or should be granted.

Respectfully submitted,

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December 1995